

1 JOHN R. TYLER  
2 Assistant Branch Director  
3 DANIEL RIESS  
4 Trial Attorney  
5 U.S. Department of Justice  
6 Civil Division, Federal Programs Branch  
7 20 Massachusetts Ave., N.W.  
8 Washington, D.C. 20530  
9 Telephone: (202) 353-3098  
10 Email: [Daniel.Riess@usdoj.gov](mailto:Daniel.Riess@usdoj.gov)  
11 Attorneys for Defendants

12  
13 UNITED STATES DISTRICT COURT  
14 DISTRICT OF NEVADA

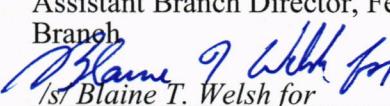
15 BARRY MICHAELS, )  
16 Plaintiff, ) Case No: 2:16-cv-00578-JAD-PAL  
17 v. )  
18 LORETTA E. LYNCH, Attorney General of the )  
19 United States, in her official capacity; and )  
20 THOMAS E. BRANDON, Deputy Director, )  
21 Bureau of Alcohol, Tobacco, Firearms & )  
22 Explosives, in his official capacity, )  
23 Defendants. )  
24

**MOTION TO DISMISS**

25 Pursuant to Fed. R. Civ. P. 12(b)(1) and 12(b)(6), Defendants Loretta E. Lynch, Attorney  
26 General of the United States, in her official capacity; and Thomas E. Brandon, Deputy Director of  
27 the Bureau of Alcohol, Tobacco, Firearms & Explosives, move to dismiss Plaintiff's complaint.  
28 In accordance with Local Civil Rule 7-2(a), this motion is supported by the following  
memorandum of points and authorities.

Dated: July 25, 2016.

Respectfully submitted,

JOHN R. TYLER  
Assistant Branch Director, Federal Programs  
Branch  
  
/s/ Blaine T. Welsh for  
DANIEL RIESS  
Trial Attorney

1                   **MEMORANDUM OF POINTS AND AUTHORITIES**

2           **I. INTRODUCTION**

3           Plaintiff, a convicted felon, seeks to challenge the constitutionality of 18 U.S.C. §  
4 922(g)(1), which prohibits firearms possession by persons convicted of crimes punishable by  
5 more than one year's imprisonment. The Court, however, should dismiss the complaint in its  
6 entirety for lack of Article III standing. Because Nevada state law prohibits felons from  
7 possessing firearms, Plaintiff cannot demonstrate that a favorable ruling is likely to redress his  
8 alleged injury, as is required under Article III in order for Plaintiff to establish standing. The  
9 Court furthermore lacks jurisdiction over the first two counts of Plaintiff's complaint because he  
10 has not identified an applicable waiver of sovereign immunity by which the United States has  
11 consented to suit. It is black letter law that the United States may not be sued without its consent  
12 and that the existence of consent is a prerequisite for jurisdiction.

13           Additionally, even if Plaintiff could overcome these jurisdictional bars, which he cannot,  
14 Plaintiff also fails to state claims on which relief can be granted, which requires the dismissal of  
15 the complaint in its entirety under Fed. R. Civ. P. 12(b)(6). Counts I and II, asserted under the  
16 Declaratory Judgment Act, do not state a valid claim because that Act does not provide Plaintiff  
17 with a private right of action. Count III, which asserts a Second Amendment claim, is not legally  
18 valid because the Ninth Circuit has held that felons such as Plaintiff do not fall within the scope  
19 of that Amendment's protection. Count IV, which asserts a due process claim, also fails as a  
20 matter of law because Plaintiff identifies no protected liberty or property interest, and in any  
21 event, due process does not require the government to provide a hearing where the results of such  
22 a hearing would have no bearing on whether the firearms prohibition at issue applies to him.  
23 Finally, Counts V and VI have no merit because the federal prohibition on firearms possession by  
24 felons does not violate the constitutional prohibitions against bills of attainder or cruel and  
25 unusual punishment.

26

27

28

1       **II. BACKGROUND**

2           **A. 18 U.S.C. § 922(g)(1)**

3           “Enacted in its earliest incarnation as the Federal Firearms Act of 1938, [18 U.S.C. §  
 4 922(g)(1)] initially covered those convicted of a limited set of violent crimes such as murder,  
 5 rape, kidnapping, and burglary, but extended to both felons and misdemeanants convicted of  
 6 qualifying offenses.” *United States v. Booker*, 644 F.3d 12, 24 (1st Cir. 2011), *cert. denied*, 132  
 7 S. Ct. 1538 (2012) (citations omitted); *see* Federal Firearms Act, ch. 850, §§ 1(6), 2(f), Pub. L.  
 8 No. 75-785, 52 Stat. 1250, 1250-51 (1938). In 1961, Congress amended this Act to prohibit “any  
 9 person . . . convicted of a crime punishable by imprisonment for a term exceeding one year” from  
 10 “receiv[ing] any firearm or ammunition which has been shipped or transported in interstate or  
 11 foreign commerce.” *See* An Act to Strengthen the Federal Firearms Act, Pub. L. No. 87-342, 75  
 12 Stat. 757 (1961); H.R. Rep. No. 87-1202, at 4-5 (1961). Congress introduced the amendment at  
 13 the specific request of the Attorney General as “an integral part of an anticrime legislative  
 14 program” in response to the “exploding crime rate” of recent years. H.R. Rep. No. 87-1202, at 2.  
 15 Its purpose was to “better assist local authorities in the common assault on crime” and to “make it  
 16 more difficult for the criminal elements of our society to obtain firearms.” *Id.*

17           These prohibitions are codified at 18 U.S.C. § 922(g)(1), which, as amended, prohibits  
 18 “any person . . . who has been convicted in any court of, a crime punishable by imprisonment for  
 19 a term exceeding one year” from “possess[ing] in or affecting commerce, any firearm or  
 20 ammunition.” Excluded from “[t]he term ‘crime punishable by imprisonment for a term  
 21 exceeding one year’” are “State offense[s] classified by the laws of the State as a misdemeanor  
 22 and punishable by a term of imprisonment of two years or less.” 18 U.S.C. § 921(a)(20)(B).<sup>1</sup>

23           **B. Plaintiff’s Conviction**

24           In 1997, a criminal indictment was filed against Plaintiff in the U.S. District Court for the  
 25 Central District of California. *See* Docket Sheet, *United States v. Michaels*, No. 2:97-cr-00799

---

26

27           <sup>1</sup> Also excluded is “[a]ny conviction which has been expunged, or set aside or for which a person has been  
 28 pardoned or has had civil rights restored . . . unless such pardon, expungement, or restoration of civil rights  
 expressly provides that the person may not ship, transport, possess, or receive firearms.” *Id.* § 921(a)(20).

1 (C.D. Cal. Aug. 21, 1997) (attached as Ex. 1). On May 6, 1998, Plaintiff pleaded guilty to one  
 2 count of securities fraud, in violation of 15 U.S.C. §§ 78j(b) and 78ff, and 17 U.S.C. § 240.10b-5;  
 3 and to one count of subscribing to a false tax return, in violation of 26 U.S.C. § 7206(1).  
 4 Judgment and Probation/Commitment Order, *United States v. Michaels*, No. 2:97-cr-00799 (C.D.  
 5 Cal. May 11, 1998) (attached as Ex. 2).<sup>2</sup> Plaintiff was sentenced to 21 months' imprisonment,  
 6 and three years of supervised release. *Id.* at 1.

7       **III.     LEGAL STANDARDS**

8       Defendants have moved to dismiss under Fed. R. Civ. P. 12(b)(1) and 12(b)(6). Federal  
 9 Rule of Civil Procedure 12(b)(1) allows a party to move for dismissal of a claim or action for lack  
 10 of subject matter jurisdiction. Federal district courts are courts of limited jurisdiction, and  
 11 “presume [ ] that a cause lies outside this limited jurisdiction.” *Kokkonen v. Guardian Life Ins.*  
 12 *Co. of Am.*, 511 U.S. 375, 377 (1994). The plaintiff bears the burden of proving that the case is  
 13 properly in federal court. *McCauley v. Ford Motor Co.*, 264 F.3d 952, 957 (9th Cir. 2001)  
 14 (citation omitted). When a challenge to subject matter jurisdiction has been properly raised, the  
 15 opposing party must “present affidavits or any other evidence necessary to satisfy its burden of  
 16 establishing that the court, in fact, possesses subject matter jurisdiction.” *St. Clair v. City of*  
 17 *Chico*, 880 F.2d 199, 201 (9th Cir. 1989).

18       Federal Rule of Civil Procedure 12(b)(6) allows a party to move to dismiss for failure to  
 19 state a claim on which relief can be granted. A motion to dismiss under Rule 12(b)(6) tests the  
 20 legal sufficiency of a complaint. *Navarro v. Block*, 250 F.3d 729, 732 (9th Cir. 2001). Under a  
 21 Rule 12(b)(6) challenge, a court accepts the factual allegations in the complaint as true, but the  
 22 court does not accept as true legal conclusions couched as factual allegations. *Brown v. Elec.*  
 23 *Arts, Inc.*, 724 F.3d 1235, 1247-48 (9th Cir. 2013). “Dismissal is proper when the complaint does  
 24 not make out a cognizable legal theory or does not allege sufficient facts to support a cognizable

25  
 26  
 27       

---

  
 28 <sup>2</sup> Exhibits 1 and 2 have been redacted in accordance with the Federal Rule of Civil Procedure 5.2 and Local Civil Rule 6-1.

1 legal theory.” *Chubb Custom Ins. Co. v. Space Sys./Loral, Inc.*, 710 F.3d 946, 956 (9th Cir.  
 2 2013).<sup>3</sup>

3 **IV. ARGUMENT**

4 **A. The Court Should Dismiss the Complaint Because Plaintiff Fails to Satisfy the  
 Redressability Requirement of Article III Standing.**

5 “Article III of the Constitution grants the federal courts the power to decide legal  
 6 questions only in the presence of an actual ‘Cas[e]’ or ‘Controvers[y].’” *Wittman v.  
 Personhuballah*, 136 S. Ct. 1732, 1736 (2016). “This restriction requires a party invoking a  
 8 federal court’s jurisdiction to demonstrate standing.” *Id.* (citing *Arizonans for Official English v.  
 Arizona*, 520 U.S. 43, 64 (1997)). To establish standing, (1) the plaintiff must have suffered an  
 10 “injury in fact;” (2) “there must be a causal connection between the injury and the conduct  
 11 complained of – the injury has to be fairly traceable to the challenged action of the defendant, and  
 12 not the result of the independent action of some third party not before the court; and (3) it must be  
 13 likely, as opposed to merely speculative, that the injury will be redressed by a favorable decision.  
 14 *Lujan v. Defs. of Wildlife*, 504 U.S. 555, 560-61 (1992) (internal citations and punctuation  
 15 omitted).

16 Determining redressability “requires an analysis of whether the court has the power to  
 17 right or to prevent the claimed injury.” *Barnum Timber Co. v. U.S. E.P.A.*, 633 F.3d 894, 899  
 18 (9th Cir. 2011). “There is no standing if, following a favorable decision, whether the injury  
 19

---

20 <sup>3</sup> In ruling on a motion to dismiss filed pursuant to Rule 12(b)(6), the court may consider “matters properly  
 21 subject to judicial notice.” *Outdoor Media Group, Inc. v. City of Beaumont*, 506 F.3d 895, 899 (9th Cir.  
 22 2007) (citation and internal punctuation omitted). Under Federal Rule of Evidence 201, “[t]he court may  
 23 judicially notice a fact that is not subject to reasonable dispute because it . . . can be accurately and readily  
 24 determined from sources whose accuracy cannot reasonably be questioned.” Fed. R. Evid. 201. The Court  
 25 may take judicial notice of Exhibits 1 and 2 as undisputed matters of public record. *See Bennett v.  
 Medtronic, Inc.*, 285 F.3d 801, 803 n.2 (9th Cir. 2002) (taking judicial notice of filings in state court  
 26 proceeding); *U.S. ex rel. Robinson Rancheria Citizens Council v. Borneo, Inc.*, 971 F.2d 244, 248 (9th Cir.  
 27 1992) (“[W]e may take notice of proceedings in other courts, both within and without the federal judicial  
 28 system, if those proceedings have a direct relation to matters at issue.”) (citation and internal punctuation  
 omitted); *White v. Martel*, 601 F.3d 882, 885 (9th Cir. 2010) (taking judicial notice of docket sheet in a  
 different federal case); *Bell v. Smith*, No. 2:14-cv-01730, 2015 WL 7432948, at \*4 (D. Nev. Nov. 3, 2015)  
 (taking judicial notice that plaintiff had been charged with being a felon in possession of a firearm in  
 plaintiff’s pending criminal case); *Ferm v. McCarty*, No. 2:12-cv-00782, 2014 WL 6983234, at \*3 (D.  
 Nev. Dec. 9, 2014) (taking judicial notice of plaintiff’s indictment, plea agreement, and transcript of plea  
 colloquy).

would be redressed would still depend on ‘the unfettered choices made by independent actors not before the courts.’” *Novak v. United States*, 795 F.3d 1012, 1020 (9th Cir. 2015) (quoting *ASARCO Inc. v. Kadish*, 490 U.S. 605, 615 (1989)). Here, Plaintiff cannot satisfy the redressability prong of Article III standing. Independently of 18 U.S.C. § 922(g)(1), Nevada law prohibits the possession of firearms by a person who “[h]as been convicted of . . . a felony in violation of the laws of the United States of America.” Nev. Rev. Stat. Ann. § 202.360(1)(b).<sup>4</sup> Because of this state-law prohibition on the possession of firearms by felons, granting Plaintiff his requested relief and invalidating Section 922(g)(1) will not redress his alleged injury (the inability to possess a firearm); the federal prohibition “would simply fall away,” leaving intact the Nevada prohibition on firearms possession by felons. *White v. United States*, No. 08-118, 2009 WL 173509, at \*5 (S.D. Ohio Jan. 26, 2009); *see Get Outdoors II, LLC v. City of San Diego*, 506 F.3d 886, 894-95 (9th Cir. 2007) (declining to reach constitutional claims challenging denial of permit application on the basis of one provision of law when other, independent laws required same denial); *McConnell v. FEC*, 540 U.S. 93, 229 (2003) (no standing where, following invalidation of the federal law, “limitations imposed by [state law] . . . would remain unchanged,” and so a favorable ruling “w ould not redress [the] alleged injury”), *overruled on other grounds by Citizens United v. Fed. Election Comm’n*, 558 U.S. 310 (2010). Where Plaintiff’s injury would not be ameliorated by action of the Court, there is no standing. *See Steel Co. v. Citizens for a Better Env’t*, 523 U.S. 83, 107 (1998) (“Relief that does not remedy the injury suffered cannot bootstrap a plaintiff into federal court; that is the very essence of the redressability requirement.”).

Because Plaintiff has failed to satisfy the redressability requirement of Article III standing, the Court should dismiss the complaint for lack of subject matter jurisdiction.

**B. The Court Should Dismiss Counts I and II for Lack of Subject Matter Jurisdiction.**

“The United States, as a sovereign, is immune from suit unless it has waived its immunity.” *Balser v. Dep’t of Justice, Office of U.S. Tr.*, 327 F.3d 903, 907 (9th Cir. 2003). This

---

<sup>4</sup> Though this prohibition does not apply if the person in question “has received a pardon and the pardon does not restrict his or her right to bear arms,” *id.*, Plaintiff does not allege that he has received a pardon.

1 immunity extends to federal officials sued in their official capacities. *See Gilbert v. DaGrossa*,  
 2 756 F.2d 1455, 1458 (9th Cir. 1985) (“[T]he bar of sovereign immunity cannot be avoided by  
 3 naming officers and employees of the United States as defendants.”). Because Plaintiff fails to  
 4 identify a valid sovereign immunity waiver for Counts I and II, the Court should dismiss those  
 5 Counts for lack of subject matter jurisdiction. *See, e.g., United States v. Mitchell*, 463 U.S. 206,  
 6 212 (1983) (“It is axiomatic that the United States may not be sued without its consent and that  
 7 the existence of consent is a prerequisite for jurisdiction.”).

8 Count I seeks a declaration that “the *implicit purpose*” of the Gun Control Act of 1968  
 9 “was to prevent violent crimes,” Compl. ¶ 26 (emphasis in original), and Count II seeks a  
 10 declaration that Plaintiff “enjoy[s] the same *presumption* of being (a) ‘law-abiding’ citizen(s) as  
 11 any *non-convicted* person(s) are.” *Id.* ¶ 29 (emphasis in original). The complaint alleges that  
 12 Counts I and II arise under the Declaratory Judgment Act, 28 U.S.C. § 2201. *See* Compl. ¶¶ 21-  
 13 29. That Act provides in relevant part that “[i]n a case of actual controversy *within its*  
 14 *jurisdiction*, . . . any court of the United States, upon the filing of an appropriate pleading, may  
 15 declare the rights and other legal relations of any interested party seeking such declaration,  
 16 whether or not further relief is or could be sought.” 28 U.S.C. § 2201(a) (emphasis added).  
 17 However, the Act “does not constitute the United States’ consent to be sued, it ‘merely grants an  
 18 additional remedy in cases where jurisdiction already exists in the court.’” *W. Shoshone Nat'l*  
 19 *Council v. United States*, 408 F. Supp. 2d 1040, 1047-48 (D. Nev. 2005) (quoting *Brownell v.*  
 20 *Ketcham Wire & Mfg. Co.*, 211 F.2d 121, 128 (9th Cir. 1954)). Absent a valid sovereign  
 21 immunity waiver, the Court lacks subject matter jurisdiction over Counts I and II. *See also*  
 22 *Morongo Band of Mission Indians v. California State Bd. of Equalization*, 858 F.2d 1376, 1382-  
 23 83 (9th Cir. 1988) (explaining that the Declaratory Judgment Act “does not constitute an  
 24 independent basis for jurisdiction”) (citation omitted). The Court should therefore dismiss Counts  
 25 I and II for lack of subject matter jurisdiction.

26

27

28

1           C.     The Court Should Dismiss the Complaint for Failure to State a Claim.

2           1.     **The Court Should Dismiss Counts I and II Because Plaintiff Cannot**  
 3           **Assert a Stand-Alone Cause of Action Under the Declaratory**  
 4           **Judgment Act, and Has No Private Right of Action to Enforce the**  
 5           **Preamble to the Gun Control Act.**

6           The Declaratory Judgment Act is also insufficient to provide a cause of action for Counts I  
 7           and II of Plaintiff's complaint, and absent a cause of action, Plaintiff's claims must be dismissed  
 8           for failure to state a claim. *See Pettit v. Fed. Nat'l Mortg. Ass'n*, No. 2:11-cv-00149, 2014 WL  
 9           584876, at \*4, 6 (D. Nev. Feb. 11, 2014) (explaining that "a 'claim' for declaratory relief is not a  
 10          substantive cause of action at all; it is merely a prayer for a remedy," and dismissing complaint  
 11          under Fed. R. Civ. P. 12(b)(6)). As noted above, Count I, which seeks a declaration that the  
 12          implicit purpose of the Gun Control Act is to prevent violent crimes, and Count II, which seeks a  
 13          declaration that Plaintiff is entitled to a presumption of being a law-abiding citizen, are asserted  
 14          under the Declaratory Judgment Act. *See Compl. ¶¶ 21-29*. However, it is well settled that the  
 15          Declaratory Judgment Act does not create a stand-alone, independent cause of action; instead, it  
 16          only provides a remedy for existing causes of action. *See Frudden v. Pilling*, 842 F. Supp. 2d  
 17          1265, 1280 (D. Nev. 2012) ("Where there is no private right of action, there is no jurisdiction to  
 18          entertain a request for a declaration under 28 U.S.C. § 2201; to hold otherwise would evade the  
 19          intent of a legislature not to create private rights of action under those statutes and would  
 20          circumvent the discretion entrusted to the executive branch in deciding how and when to enforce  
 21          those statutes. The availability of relief under the Declaratory Judgment Act presupposes the  
 22          existence of a judicially remediable right."), *rev'd on other grounds*, 742 F.3d 1199 (9th Cir.  
 23          2014); *Vitale & Assocs., LLC v. Lowden*, No. 2:12-cv-1400-JAD-VCF, 2015 WL 4603471, at \*3  
 24          (D. Nev. July 30, 2015) ("[A] declaratory judgment is a remedy, not an independent claim."); 5  
 25          Wright & Miller, *Federal Practice and Procedure* § 1238 (3d ed. 2004) ("The Declaratory  
 26          Judgment Act neither extends the jurisdiction of the federal courts nor enlarges substantive  
 27          rights.").

28           Furthermore, there is no alternative private right of action under which Plaintiff could  
 bring Counts I and II. Other than the Declaratory Judgment Act, the sole basis asserted for

Counts I and II is a statement of congressional purpose issued when Congress enacted the Gun Control Act. *See* Compl. ¶¶ 21-29 (quoting and relying on Pub. L. No. 90-618, § 101, 82 Stat. 1213-14, which states in relevant part: “The Congress hereby declares that the purpose of this title is to provide support to Federal, State, and local law enforcement in their fight against crime and violence, and it is not the purpose of this title to place any undue or unnecessary Federal restrictions or burdens on law-abiding citizens with respect to the acquisition, possession, or use of firearms . . .”). This cited text is not part of the Gun Control Act itself, *see* 18 U.S.C. § 921 *et seq.*, but merely a preamble or “statement of Congress’ purpose.” *United States v. Lam*, 20 F.3d 999, 1001 (9th Cir. 1994). Such a preamble or congressional declaration of purpose creates no legal rights and has no legal effect. *See Montes v. Bank of Am. NA*, No. 2:13-cv-00660, 2014 WL 1494234, at \*13 (D. Nev. Apr. 15, 2014) (dismissing claim based on provision of U.S. Code carrying the title “Congressional findings and declaration of purpose,” because “[t]here is simply no statutory basis for a cognizable cause of action” for such a provision). Because the Declaratory Judgment Act does not provide Plaintiff a private right of action, and there is no other available private right of action, the Court should dismiss Counts I and II for failure to state a claim.

**2. The Court Should Dismiss Count III Because the Ninth Circuit Has Held That Felons Do Not Fall Within the Protections of the Second Amendment.**

Felons do not fall within the protections of the Second Amendment, and Plaintiff’s Second Amendment and substantive due process claims are therefore without merit. Count III of the complaint seeks a declaration that Plaintiff’s inability to possess firearms violates his substantive due process rights under the Fifth Amendment, and that consequently, his “Second Amendment right(s) have been equally violated.” Compl. ¶ 39. Initially, Plaintiff does not assert a valid Fifth Amendment claim; where the Second Amendment “provides an explicit textual source” to analyze, it is well established that substantive due process protections are not available. *See Albright v. Oliver*, 510 U.S. 266, 273 (1994) (“Where a particular Amendment provides an explicit textual source of constitutional protection against a particular sort of government behavior, that Amendment, not the more generalized notion of substantive due process, must be

1 the guide for analyzing these claims.”) (citation and internal punctuation omitted). Here, the  
 2 Second Amendment explicitly provides the relevant constitutional standard to analyze regulation  
 3 of the “keep[ing] and bear[ing of] arms,” U.S. Const. amend. II, and therefore, Plaintiff’s Fifth  
 4 Amendment claim must be dismissed. *See Wilson v. Holder*, 7 F. Supp. 3d 1104, 1122-23 (D.  
 5 Nev. 2014) (dismissing substantive due process claim by plaintiff who was prohibited from  
 6 possessing firearm under 18 U.S.C. § 922(g)(3), as unlawful user of controlled substance);  
 7 *Texeira v. Cnty. of Alameda*, 822 F.3d 1047, 1052 (9th Cir. 2016) (rejecting gun store owners’  
 8 equal protection challenge as “no more than a Second Amendment claim dressed in equal  
 9 protection clothing”) (internal punctuation omitted).<sup>5</sup>

10 Equally unavailing is Plaintiff’s Second Amendment challenge. The Ninth Circuit “held  
 11 in *United States v. Vongxay*, 594 F.3d 1111 (9th Cir. 2010), that ‘felons are categorically different  
 12 from the individuals who have a fundamental right to bear arms,’ and . . . accordingly upheld 18  
 13 U.S.C. § 922(g)(1) against a Second Amendment challenge.” *United States v. Phillips*, \_ F.3d \_,  
 14 2016 WL 3675450, at \*3 (9th Cir. July 6, 2016); *see also Van Der Hule v. Holder*, 759 F.3d 1043,  
 15 1050-51 (9th Cir. 2014) (relying on *Vongxay* to uphold 18 U.S.C. § 922(g)(1) as constitutional).  
 16 In *Vongxay*, the Ninth Circuit concluded that “there appears to be a consensus that, even given the  
 17 Second Amendment’s individual right to bear arms, felons’ Second Amendment rights can be  
 18 reasonably restricted,” 594 F.3d at 1117, and “h[e]ld that § 922(g)(1) does not violate the Second  
 19 Amendment as it applies to *Vongxay*, a convicted felon.” *Id.* at 1118 (citing *United States v.*  
 20 *Younger*, 398 F.3d 1179 (9th Cir. 2005)). Like Plaintiff, the defendant in *Phillips* argued that  
 21 permitting his “non-violent” crime – misprision of a felony – to serve as a predicate for Section  
 22 922(g)(1)’s firearms prohibition violated the Second Amendment. *Phillips*, \_ F.3d \_, 2016 WL  
 23 3675450, at \*2. The Ninth Circuit squarely rejected this argument, holding that “[o]ur decision in  
 24 *Vongxay* forecloses Phillips’s argument.” *Id.* at \*3. These clear holdings by the Ninth Circuit

---

25  
 26<sup>5</sup> Significantly, substantive due process claims are barred where another constitutional provision addresses  
 27 the same subject matter, whether or not a plaintiff has a viable claim on the merits under the other  
 28 provision. *See Wilson*, 7 F. Supp. 3d at 1123. It is therefore irrelevant under the Fifth Amendment that  
 Plaintiff’s Second Amendment claim must also be dismissed; the mere existence of the Second  
 Amendment suffices to bar Plaintiff’s Fifth Amendment claim. *See Albright*, 510 U.S. at 273.

1 equally foreclose Plaintiff's similar claim that as applied to him, Second 922(g)(1) violates the  
 2 Second Amendment. The Court should thus dismiss Count III.

3       **3. The Court Should Dismiss Count IV Because Plaintiff Has Failed to  
         Identify a Protected Liberty or Property Interest, and Because Due  
         Process Does Not Require a Hearing to Address a Fact Not Relevant to  
         the Substantive Inquiry Here.**

6       In Count IV, Plaintiff alleges a purported "procedural due process" claim under the Fifth  
 7 Amendment, but Plaintiff has not demonstrated either "a deprivation of a constitutionally  
 8 protected liberty or property interest" or a "denial of [] procedural protections," the two elements  
 9 required to maintain such a claim. *Brewster v. Bd. of Education of Lynwood*, 149 F.3d 971, 982  
 10 (9th Cir. 1998). Here, as described above, Plaintiff can have no constitutionally protected interest  
 11 in possessing a firearm because "felons are categorically different from the individuals who have  
 12 a fundamental right to bear arms." *Phillips*, \_ F.3d \_, 2016 WL 3675450, at \*3; *see also Wilson*,  
 13 7 F. Supp. 3d at 1116-19, 1123-24 (rejecting procedural due process claim, asserted by plaintiff  
 14 who was prohibited from possessing firearms because she possessed a state marijuana registry  
 15 card, that "Defendants have denied the Plaintiff adequate procedural protections before depriving  
 16 her of her right to purchase and possess a firearm"; because plaintiff had failed to state a valid  
 17 Second Amendment claim, her procedural due process claim lacked merit because she had "failed  
 18 to identify a constitutionally protected liberty or property interest, as required by the Fifth  
 19 Amendment"); *Fisher v. Kealoha*, 49 F. Supp. 3d 727, 748 (D. Haw. 2014) ("Because Plaintiff  
 20 cannot establish a liberty or property interest under the Second Amendment, the Court further  
 21 concludes that Plaintiff cannot establish that his Fourteenth Amendment due process rights were  
 22 violated."). Apart from his meritless Second Amendment claim, Plaintiff has not alleged any  
 23 liberty or property interest of which he has been deprived, and so his procedural due process  
 24 claim should be dismissed on this basis alone. *See Wilson*, 7 F. Supp. 3d at 1123 ("The Court  
 25 need not reach the second element because Plaintiff has not alleged that Defendants deprived her  
 26 of a constitutionally protected liberty or property interest.") (citing *Bd. of Regents v. Roth*, 408  
 27 U.S. 564, 569 (1972)).

Moreover, Plaintiff's procedural due process claim cannot succeed in any event because Plaintiff fails to identify any constitutionally-required procedural due process that he has been denied. Where the requirements of a law protecting public safety "turn on an offender's conviction alone – a fact that a convicted offender has already had a procedurally safeguarded opportunity to contest," procedural due process does not require an individualized hearing on dangerousness. *Connecticut Department of Public Safety v. Doe*, 538 U.S. 1, 7 (2003). The Supreme Court in *Doe* rejected a procedural due process challenge to a state's sex offender registry. *Id.* at 7-8. In that case, convicted sex offenders had challenged a law requiring them to register with the state following release from prison, asserting that it offended due process by impinging on their liberty without providing them an opportunity to demonstrate that they, as individuals, were not likely to be currently dangerous. *Id.* at 4. The Supreme Court rejected the claim because the government may properly regulate convicted offenders in the interests of public safety based "on the fact of previous conviction, not on the fact of current dangerousness," and thus concluded that "any hearing on current dangerousness is a bootless exercise." *Id.* at 4, 7-8.

Applying *Doe*, courts have easily concluded that felons may be restricted from firearms possession without individualized dangerousness hearings. *See, e.g., Black v. Snow*, 272 F. Supp. 2d 21, 34 (D.D.C. 2003), *aff'd*, 110 F. App'x 130 (D.C. Cir. 2004); *Bell v. United States*, No. 13-5533, 2013 WL 5763219, at \*3 (E.D. Pa. Oct. 24, 2013), *aff'd*, 574 F. App'x 59 (3d Cir. 2014). The plaintiff in *Black*, a convicted felon, alleged a procedural due process claim that "he may not be deprived of his right to bear arms without first being afforded the chance to show that he is not dangerous." *Black*, 272 F. Supp. 2d at 34. However, the court held that the plaintiff's argument was foreclosed by *Doe*, recognizing that "where it is clear that the government would strip the individual of his liberty even if he were able to prove or disprove the particular the fact or set of facts[], such a hearing would be an exercise in futility, which is not required by *procedural* due process." *Id.* (emphasis in original).

Here, "[t]his understanding of due process dooms any procedural challenge to § 922(g)(1)" because "[t]he plain language of that provision makes clear Congress' decision to bar *all* convicted felons (not merely those with violent tendencies or who otherwise present an

1 ongoing danger to society) from possessing firearms.” *Black*, 272 F. Supp. 2d at 34 (emphasis in  
 2 original). Thus, under *Doe*, “due process does not entitle plaintiff to a hearing to determine  
 3 whether he is currently dangerous because the results of such a hearing would have no bearing on  
 4 whether he is subject to the disability imposed by § 922(g)(1).” *Id.* at 35.

5 The court in *Bell* similarly rejected a procedural due process challenge to 18 U.S.C. §  
 6 922(g)(1) and “conclude[d], for the reasons stated by the District Court, that [the plaintiff]’s  
 7 procedural due process claim . . . [is] without merit.” *Bell*, 574 F. App’x at 61. As in *Black*, the  
 8 plaintiff had claimed that Section 922(g)(1) violated due process because the statute had allegedly  
 9 “deprive[d] [plaintiff] of the ability to possess a firearm without providing him a hearing to  
 10 determine his future dangerousness.” *Bell*, 2013 WL 5763219, at \*3 (citation and internal  
 11 punctuation omitted). The court rejected this claim for the same reasons stated in *Black*. *See id.*

12 In short, due process does not require that a procedure be “incorporated into the criminal  
 13 adjudication process to determine in advance” whether Plaintiff is or was “likely to be a threat to  
 14 use a firearm in an act of violence,” Compl. ¶ 42, because the only matter relevant to Section  
 15 922(g)(1) is whether Plaintiff was convicted of a crime punishable by more than one year’s  
 16 imprisonment. *See Doe*, 538 U.S. at 4 (“[D]ue process does not require the opportunity to prove a  
 17 fact that is not material to the State’s statutory scheme”); *Nnebe v. Daus*, \_ F. Supp. 3d \_, 2016  
 18 WL 2865473, at \*7 (S.D.N.Y. Apr. 28, 2016) (“[I]t is well-established that procedural due  
 19 process does not require a government agency to provide a party with an individualized hearing  
 20 where the purpose of such a hearing would be to address a fact not relevant to the applicable  
 21 substantive inquiry.”) (citing cases). Here, where Plaintiff concedes that he has been convicted of  
 22 such a crime, *see* Compl. ¶ 1; Ex. 1-2, Plaintiff’s procedural due process claim cannot succeed,  
 23 and Count IV should thus be dismissed.

24       **4.       The Court Should Dismiss Count V Because Section 922(g)(1) Is Not a  
 25           Bill of Attainder.**

26       In Count V, Plaintiff contends that as applied to him, Section 922(g)(1) violates the United  
 27 States Constitution’s prohibition against bills of attainder. Compl. ¶¶ 52-58. This contention has  
 28 no merit. Article I, Section 9 of the Constitution provides that “[n]o Bill of Attainder . . . shall be

1 passed.” U.S. Const. art. I, § 9, cl. 3. “A bill of attainder is ‘a law that legislatively determines  
2 guilt and inflicts punishment upon an identifiable individual without provision of the protections  
3 of a judicial trial.’” *SeaRiver Mar. Fin. Holdings, Inc. v. Mineta*, 309 F.3d 662, 668 (9th Cir.  
4 2002) (citing *Nixon v. Adm’r of Gen. Servs.*, 433 U.S. 425, 468 (1977)). The Ninth Circuit has  
5 held that 18 U.S.C. §§ 922(d)(1) and (n) – which prohibit the sale of firearms to, or the shipping  
6 or transportation of firearms by, persons convicted of or under indictment for a crime punishable  
7 by imprisonment exceeding one year – do not constitute bills of attainder because they “set forth a  
8 rule generally applicable to all persons possessing a certain characteristic, i.e., having been  
9 indicted for a felony,” and are therefore “reasonably calculated to achieve a nonpunitive public  
10 purpose, i.e., to keep firearms out of the hands of persons who, having been indicted for felonies,  
11 may “have a somewhat greater likelihood than other citizens to misuse firearms.” *United States v.*  
12 *Munsterman*, 177 F.3d 1139, 1142 (9th Cir. 1999); *see also Williams v. United States*, 426 F.2d  
13 253, 255 (9th Cir. 1970) (former federal statute prohibiting any person indicted for or convicted  
14 of a crime punishable by imprisonment exceeding one year from transporting firearms was not a  
15 bill of attainder). For similar reasons, courts have rejected claims that Section 922(g)(1)  
16 constitutes a bill of attainder. *See United States v. Stauffer*, 156 F.3d 1241 (9th Cir. 1998) (table);  
17 *United States v. Hemmings*, 258 F.3d 587, 594-95 (7th Cir. 2001); *United States v. Davis*, 27 F.  
18 App’x 592, 600 (6th Cir. 2001); *Bell*, 574 F. App’x at 61; *Freeze v. Obama*, No. 11-1098, 2011  
19 WL 2446596, at \*1 (D.D.C. June 15, 2011); *see also Zivkovic v. Reinke*, No. 11-624, 2013 WL  
20 6905974, at \*3-4 (D. Idaho Dec. 31, 2013) (Idaho statute prohibiting firearms possession by  
21 felons was not bill of attainder); *Swartz v. Ryan*, No. CV 12-23, 2014 WL 2048057, at \*11-13 (D.  
22 Ariz. May 19, 2014) (Arizona statute prohibiting firearms possession by felons was not bill of  
23 attainder). In any event, Plaintiff is subject to Section 922(g)(1)’s prohibition against possessing  
24 firearms because he has had a “judicial trial,” *SeaRiver*, 309 F.3d at 668, as a result of which he  
25 was found guilty of a felony. *See Artway v. Att’y Gen. of State of N.J.*, 81 F.3d 1235, 1253 n.15  
26 (3d Cir. 1996) (questioning plaintiff’s argument that registration provisions of Megan’s Law  
27 constituted a bill of attainder when he “had a trial, at which he was convicted of the crime  
28 triggering registration”). The Court should therefore dismiss Count V.

1           **5. The Court Should Dismiss Count VI Because 18 U.S.C. § 922(g)(1)  
2 Does Not Violate the Constitutional Prohibition Against Cruel and  
3 Unusual Punishments.**

4           Finally, in Count VI, Plaintiff alleges that as applied to him, Section 922(g)(1) violates his  
5 right to be free of cruel and unusual punishment under the Eighth Amendment. Compl. ¶¶ 60-63.  
6           This allegation is meritless, as courts have repeatedly rejected Eighth Amendment challenges to  
7 Section 922(g)(1). *See United States v. Watkins*, 12 F.3d 1110 (9th Cir. 1993) (table); *United*  
8 *States v. Jester*, 139 F.3d 1168, 1170 (7th Cir. 1998); *United States v. Dowis*, \_\_ F. App'x \_\_,  
9 2016 WL 641100, at \*2 (11th Cir. Feb. 18, 2016); *Bell*, 574 F. App'x at 61; *see also United States*  
10 *v. Lewis*, 236 F.3d 948, 950 (8th Cir. 2001) (federal firearms prohibition for conviction of  
11 domestic violence misdemeanor did not constitute cruel and unusual punishment). Furthermore,  
12 Plaintiff no more succeeds in his reliance on the doctrines of substantive and procedural due  
13 process with respect to Count VI than in his equally mistaken reliance on these same doctrines  
with respect to Counts III and IV, as described above. Count VI should therefore be dismissed.

14           **V. CONCLUSION**

15           For the reasons stated above, Defendants respectfully request that the Court dismiss  
16 Plaintiff's complaint for lack of subject matter jurisdiction and for failure to state a claim on  
17 which relief can be granted.

18           Dated this 25th day of July 2016.

19           JOHN R. TYLER  
20           Assistant Branch Director  
21           Civil Division, Federal Programs Branch

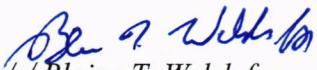
22             
23           \_\_\_\_\_  
24           /s/ Blaine T. Welsh for  
25           DANIEL RIESS  
26           Trial Attorney

1                   **PROOF OF SERVICE**

2                   I hereby certify that this **MOTION TO DISMISS** was served this date on all parties via  
3 electronic mail at the following address:

4                   Michael E. Zapin  
5                   Law Offices of Michael E. Zapin  
6                   20283 State Rd 7, Ste. 400  
7                   Boca Raton, Florida 33498  
8                   [michaelezapin@gmail.com](mailto:michaelezapin@gmail.com)  
9                   *Counsel for Plaintiff*

10                  Dated this 25th day of July 2016.

11                    
12                  /s/ Blaine T. Welsh for  
13                  DANIEL RIESS  
14                  Trial Attorney

15  
16  
17  
18  
19  
20  
21  
22  
23  
24  
25  
26  
27  
28